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Foreword

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Foreword

Justice Sandra Day O'Connor

I am pleased to write the Foreword to this special issue of the *Duquesne Law Review* dedicated to "Judicial Independence," a topic that has occupied my time and interest over the past few years. After serving as an Associate Justice on the Supreme Court for 25 years, I feel strongly that lawyers and judges must work tirelessly to strengthen the foundations of our democratic republic in order to ensure its vitality for future generations. Ensuring the independence of our judicial branch is an essential element of our tripartite system of government.

James Madison, one of the fathers of our Constitution, declared in the introduction of the Bill of Rights in Congress that an independent judiciary would serve as "an impenetrable bulwark against every assumption of power in the Legislative or Executive."¹ Those are powerful words. In our common-law system based on adherence to precedent and recognition of freedoms delineated in our Constitution and the Bill of Rights, it is essential that members of the judicial branch serve as guardians to protect against encroachment upon, or erosion of, those all-important rights and privileges.

Alexander Hamilton, writing in Federalist No. 78, similarly emphasized that judicial independence is indispensable in the American system, because the judiciary is charged with ensuring that the other branches of government adhere to our Constitution. Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

1. 1 Annals of Cong. 457 (Joseph Gales ed., 1789) (statement of Rep. Madison).

reservations of particular rights or privileges would amount to nothing.²

In modern times, politicians on both sides of the political aisle have frequently criticized the Court for perceived instances of “judicial activism.” It has become commonplace to charge that “elitist judges” are legislating from the bench rather than mechanically plugging in the facts and churning out the proper result dictated by legislative action or executive command. Yet such criticisms of the judiciary too often overlook the fact that judges are often obligated, in the cases before them, to review the acts of the other branches of government for constitutionality. Ever since Chief Justice John Marshall authored the landmark opinion in *Marbury v. Madison*³ in 1803, the judicial branch has shouldered the responsibility of serving as a dispassionate referee, charged with determining whether acts of Congress or the President conform to the dictates of the Constitution. This is our system of government in the United States; it has served us well for over 200 years.

The late Chief Justice William H. Rehnquist was fond of saying that the establishment of an independent court system, possessing the authority to declare unconstitutional laws enacted by state or federal legislatures, is perhaps the most important contribution the United States has made to the art of governing.⁴ Without an independent judiciary, sworn to safeguard the Constitution and vigilantly protect citizens’ rights, our form of American democracy would not long endure.

In the short span of time since I retired from active service on the Supreme Court in 2006, assaults on the independence of the judicial branch have escalated on several fronts. In South Dakota, a national advocacy group named “JAIL 4 Judges” sought, unsuccessfully, to promote a state constitutional amendment that would have eliminated judicial immunity and allowed a special grand jury to “censure” judges for making unpopular or undesirable legal determinations.⁵ This amounted to a thinly veiled effort to intimidate judges, by dangling the threat of punishment over their heads like a Sword of Damocles. In Pennsylvania, an advocacy

2. THE FEDERALIST NO. 78, at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

3. 5 U.S. (1 Cranch) 137 (1803).

4. Sandra Day O'Connor, *Fair and Independent Courts: Remarks by Justice O'Connor*, 95 GEO. L.J. 897, 897 (2007).

5. Rachel Caufield, *Judicial Elections: Today's Trends and Tomorrow's Forecast*, 46 NO. 1 JUDGES J. 6, *10 (2007).

group urged voters to “vote no!” on the retention of all 68 judges facing re-election in the relevant election cycle, on the theory that a “clean sweep” was necessary to send a warning to judges because the Pennsylvania Supreme Court had made an unpopular decision upholding a pay-raise for the judiciary.⁶ That effort failed; 67 out of the 68 judges facing retention were approved by the voters. In the past decade, the number of physical threats (including death threats) and inappropriate communications aimed at judges has escalated at alarming rates. It flows from a flawed understanding of the proper function of judges in our American democratic system. The moment they don their robes, judges are obligated to decide cases free from outside influences, based strictly upon the facts and the law. They cannot, and should not, be lobbied, intimidated, threatened, or promised favors (or retribution) if they hand down decisions that are disliked or disfavored by certain parties or factions. Without such a firewall of protection for the judicial branch, we would lose the separation of powers the Framers tried to create and protect.

In this special issue of the *Duquesne Law Review*, an impressive list of authors tackles the most timely issues that touch upon the subject of judicial independence. The late Chief Justice Thomas J. Moyer of Ohio discusses the philosophical importance of an independent judiciary in the American scheme of government. Darren Breslin of the Pennsylvania Commission on Judicial Independence provides an historical perspective tracing the evolution of judicial independence as a bedrock of our constitutional system.

Theodore Olson, former Solicitor General of the United States, joins his fellow counsel David B. Fawcett in expanding upon their brief in *Caperton v. A.T. Massey Coal Co.*,⁷ an important case that assists in defining the contours of a judge’s duty to maintain a high level of independence from outside forces in order to avoid even the perception of bias. This, in turn, is important in safeguarding a litigant’s right to a fair and impartial trial. In *Caperton* the Court ultimately agreed with the Olson-Fawcett position, establishing important new precedent in this area.

Keith Fisher, the principal draftsman of the ABA’s amicus brief in *Caperton*, discusses more extensively his own position on the merits of the case. Outgoing Pennsylvania Bar Association President Clifford Haines addresses steps that the state bar association

6. Brian O’Neill, *Here Stays Da Judge: The Voters Revolt Takes a Breather*, PITTSBURGH POST GAZETTE, Nov. 13, 2007, at A2.

7. 129 S. Ct. 2252 (2009).

has taken in the wake of *Caperton*. And Duquesne Law student Aaron Ludwig adds an excellent note on the impact of the *Caperton* decision.

Turning to other cutting-edge issues in the realm of judicial independence, U.S. District Judge C. Darnell Jones II of the Eastern District of Pennsylvania discusses the growing pressure that media places on judges, posing a risk to their independence. Finally, David Caroline, Shira J. Goodman, and Lynn Marks of Pennsylvanians for Modern Courts address the merits and pitfalls of electing—rather than appointing—judges. This is an issue of increased importance in many states, including Pennsylvania, particularly in the wake of recent assertions that judges are susceptible to increased political influence.

In these pages of the *Duquesne Law Review*, readers will find a useful array of scholarly commentary that sheds light on issues that confront each of us who is concerned about the future of our legal profession and our magnificent system of government in the United States. By examining the topic of judicial independence in this scholarly forum, we must hope—as lawyers, public servants, and citizens—that the “impenetrable bulwark” described by James Madison will grow even stronger.